

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at KNOXVILLE

CHARLES EDWARD BUSH)	
)	
Petitioner,)	
)	
v.)	3:06-cr-160
)	3:08-cv-116
)	<i>Jordan</i>
)	
UNITED STATES OF AMERICA)	
)	
Respondent.)	

MEMORANDUM

This is a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 filed by petitioner Charles Edward Bush ("Bush"). For the following reasons, the § 2255 motion will be **GRANTED** to the extent Bush's sentence will be **VACATED** and Bush shall be **RESENTENCED** as set forth below.

Bush pleaded guilty to wire fraud, in violation of 18 U.S.C. § 1343, and was sentenced to a term of imprisonment of 33 months. He did not file a notice of appeal. In support of his § 2255 motion, Bush alleges *inter alia* that he received ineffective assistance of counsel when his attorney failed to file a direct appeal. According to Bush, he instructed his attorney to file an appeal and she refused. Bush verifies this allegation in a supporting affidavit. [Court File No. 30, Affidavit of Charles Edward Bush].

In *Ludwig v. United States*, 162 F.3d 456 (6th Cir. 1998), the Sixth Circuit held that "failure to perfect a direct appeal, in derogation of a defendant's actual request, is a *per se* violation of the Sixth Amendment." *Id.* at 459. In response to the § 2255 motion, the government by its counsel states that the government contacted Bush's appointed counsel, "who reported no independent recollection of the case." [Court File No. 36, Response]. The government thus concedes that, absent evidence to the contrary, Bush's affidavit must be accepted as true and that Bush has established a *prima facie* case of ineffective assistance of counsel. Therefore, the government does not oppose Bush's request for a delayed direct appeal.

In the case where counsel was ineffective by failing to timely file a notice of appeal, the correct procedure is to grant the § 2255 motion and reimpose the same sentence, so that the time for filing an appeal commences again. *See Johnson v. United States*, 146 Fed.Appx. 4, 2005 WL 1506050 (6th Cir. June 27, 2005) (citing *Rosinski v. United States*, 459 F.2d 59 (6th Cir. 1972) (per curiam)).

Under the circumstances, the court finds that Bush's motion to vacate, set aside or correct sentence should be **GRANTED** on the ground that Bush was denied the effective assistance of counsel when his attorney failed to file a direct appeal. An evidentiary is not required. *See* Rule 8 of the Rules Governing Section 2255 Proceedings For The United States District Courts; *United States v. Anderson*, 409 F. Supp. 2d 925 (S.D. Ohio 2005) (granting a § 2255 petition without an evidentiary hearing where the government did not contest petitioner's allegation that her counsel failed to file an appeal after requested by

petitioner to do so). Bush's remaining claims for relief will be **DENIED WITHOUT PREJUDICE**.

Bush's sentence will be **VACATED** and the court will **REIMPOSE** the same sentence. The court will enter an Amended Judgment. Bush is hereby notified of the rights associated with an appeal from the sentence the court will reimpose:

(1) Bush has the right to appeal the reimposed sentence. The Clerk's Office will be **ORDERED** to file a notice of appeal for Bush within **TEN DAYS** from the entry of the Amended Judgment, in accordance with Fed. R. App. P. 4(b)(1)(A)(i).

(2) If Bush cannot afford counsel to represent him on appeal, he should make a request for appointment of counsel. Counsel will be appointed if Bush cannot afford an attorney to represent him on appeal. Accordingly, the Clerk will be **DIRECTED** to send Bush a CJA 23 Financial Affidavit for appointment of counsel, which Bush should complete and return, within twenty (20) days of the date of this Memorandum, if he seeks appointed counsel.

AN APPROPRIATE ORDER WILL ENTER.

s/ Leon Jordan
United States District Judge